QUESTIONS PRESENTED

1. Whether an order remanding a case to state court based on *Burford* abstention is reviewable by appeal and not merely by mandamus.

2. Whether an action at law against a private party seeking money damages can present the exceptional circumstances necessary for a federal court to decline to exercise its jurisdiction based on the *Burford* doctrine.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The names of all parties in this Court and in the United States Court of Appeals for the Ninth Circuit are contained in the caption.

Respondent is a wholly-owned subsidiary of The Allstate Corporation, a publicly traded corporation. Respondent's non-wholly owned subsidiaries are After Six Holding Corporation, Allstate Automobile & Fire Insurance Company Limited, Gainey Ranch Financial Class A L.P., Saison Life Insurance Company, Ltd., Samshin Allstate Life Insurance Company, Ltd., Saugatuck II Cellular Investment Corp., and Tramed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-244

CHUCK QUACKENBUSH, Insurance Commissioner of the State of California, in His Capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Corporation Trust,

Petitioner,

—v.—

ALLSTATE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent Allstate Insurance Company submits this brief to urge affirmance of the judgment below.

OPINIONS BELOW

The order of the District Court remanding the case to state court (Pet. App. 13a-34a) is unpublished. The order of the Court of Appeals denying petitioner's motion to dismiss the

appeal (Br. Opp. Pet. App. 1a-2a) is unpublished. The opinion of the Court of Appeals on appellate jurisdiction and the merits (Pet. App. 1a-12a) is reported at 47 F.3d 350. The order of the Court of Appeals denying rehearing (Pet. App. 35a-37a) is unpublished.

STATUTES INVOLVED

The federal statutes involved in this case are the provisions of the Judicial Code governing diversity and removal jurisdiction, 28 U.S.C. §§ 1332(a), 1441(a) (Pet. App. 115a); the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (Br. Opp. Pet. App. 4a-12a); and the provision governing appeals from final decisions of the District Courts, 28 U.S.C. § 1291 (App. 1a hereto). The state statutes involved are Article 14 of the California Insurance Code, governing Proceedings in Cases of Insolvency and Delinquency, Cal. Ins. Code §§ 1010-1062 (Pet. App. 59a-86a); and Article 14.3 of the California Insurance Code, which is known as the Uniform Insurers Rehabilitation (or Liquidation) Act, Cal. Ins. Code §§ 1064.1-1064.12 (Pet. App. 105a-114a).

STATEMENT OF THE CASE

This is a civil action for money damages commenced by petitioner, the California Insurance Commissioner acting as Liquidator and Trustee for the Mission group of insurance companies (the "Liquidator"), against respondent Allstate Insurance Company ("Allstate"). J.A. 35-61. The Mission companies (collectively, "Mission") had previously been placed in conservatorship and later in liquidation on grounds of their hazardous financial condition. Pet. App. 116a-121a; J.A. 8-34.

A. Statutory Procedures for Insurance Liquidations.

Under California law, when an insurer doing business within the state becomes insolvent, the Insurance Commissioner may apply to the Superior Court for an order authorizing the Commissioner, as conservator, to take possession of the insurer's books and property and to conduct its business. Cal. Ins. Code §§ 1011, 1064.2(c). If efforts to rehabilitate the company would be futile, the Commissioner may apply to the court for an order authorizing him or her to liquidate and wind up the insurer's business. *Id.* § 1016. An order appointing the Commissioner as conservator or liquidator of an insolvent insurer vests in the Commissioner title to all the insurer's assets. *Id.* §§ 1011, 1064.2(a)-(b). In that capacity, he or she is "deemed to be a trustee for the benefit of all creditors and other persons interested in the estate" of the insolvent insurer. *Id.* § 1057.

Because most insurance companies do business in more than one state, they can be subject to multiple receiverships. Under the Uniform Insurers Liquidation Act (the "Uniform Act"), 13 U.L.A. 321 (1986), enacted in California as Cal. Ins. Code §§ 1064.1-1064.12, the receiver in the state where the insolvent insurer is domiciled takes title to the insurer's assets wherever located. *Id.* §§ 1064.2(b), 1064.3(b).[1]

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[1] The term "receiver" is used to refer to conservators, rehabilitators and liquidators generically. *See* Cal. Ins. Code § 1064.1(k). Under the Uniform Act, receivers appointed in states other than the state of domicile perform certain functions as "ancillary receivers" with respect to assets and claimants located in their respective states. Cal. Ins. Code §§ 1064.2(b), 1064.3(b). *See also* Cal. Ins. Code § 1125, *added by* Act of Oct. 12, 1995, ch. 843, § 1, 1995 Cal. Adv. Legis. Serv. 4994, 4995-5006 (West) (enacting Interstate Insurance Receivership Compact). Indeed, it appears that the Liquidator serves as ancillary receiver of Holland-America Insurance Company, one of the entities on whose behalf he brings this action, as that company was a Missouri corporation, J.A. 8, 23, and *amicus* Missouri Director of Insurance serves as domiciliary liquidator. *Angoff v. Holland-America Ins. Co. Trust*, Notice of Order, No. CV87-4356 (Mo. Cir. Ct., Jackson Co., May 11, 1995).

1. The Collection and Management Function.

The Commissioner, as conservator or liquidator of an insolvent insurer, is responsible for conserving the insurer's assets and conducting its business and affairs. Cal. Ins. Code §§ 1037(a), 1064.2(c). To assist in that task, the Commissioner is specifically authorized to hire special deputies, counsel, clerks and assistants, all of whom are paid out of the assets of the insolvent insurer, and to delegate to them such powers as he or she deems necessary. *Id.* §§ 1035, 1064.2(c).

The conservator or liquidator is required to collect all debts due and claims belonging to the insurer, *id.* § 1037(b), but has the authority to settle claims "upon such terms and conditions as the commissioner shall deem to be most advantageous to the estate of the person being administered or liquidated," *id.* § 1037(c). With respect to such debts and claims, the California Insurance Code codifies and preserves the right of setoff, *i.e.*, the principle that a party owing money to an insolvent entity may ordinarily deduct from the debt any amount that the insolvent entity owes that party. *Id.* § 1031.[2]

For the purpose of collecting debts and performing his or her other duties, the conservator or liquidator is empowered to "prosecute and defend any and all suits and other legal proceedings" involving the insolvent insurer. *Id.* § 1037(f). Under the Uniform Act, the liquidator or conservator from an insolvent insurer's state of domicile may sue on behalf of the insurer in the courts of any state. *See id.* §§ 1064.2(b), 1064.3(b), 1064.10; Prefatory Note, 13 U.L.A. at 323.

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[2] The California Supreme Court explained in *Prudential Reinsurance v. Superior Court (Garamendi)*, 3 Cal.4th 1118, 1142, 842 P.2d 48, 63, 14 Cal. Rptr. 749, 764 (1992), that "[o]ffsetting debts not only spreads risk but also acts as mutual security for performance," thus enhancing the ability of smaller insurers, in particular, to survive and compete.

2. The Claim-Processing Function.

Besides managing the insolvent insurer's assets and collecting debts owed to it, the other principal statutory function of a liquidator is to process and pay claims of the insurer's creditors. Creditors of the insurer are sent notice and have six months to file proofs of claim with the liquidator. Cal. Ins. Code § 1021(a). If the liquidator rejects a claim, the claimant may apply to the court for allowance of the claim. *Id.* § 1032. Funds from the insolvent insurer's estate are distributed to the creditors of the estate according to priorities established by statute. *Id.* § 1033. General creditors' claims are subordinated by statute to policyholder and guarantee association claims. *Id.* § 1033(a)(6).[3]

B. The Mission Liquidation.

On November 26, 1985, the California Insurance Commissioner obtained orders from the Superior Court in Los Angeles placing Mission Insurance Company and four of its affiliates in conservatorship. Pet. App. 116a-118a, J.A. 8-19.

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[3] In a liquidation, most policyholder claims against an insolvent insurer are paid not by the insolvent insurer itself but are covered by the California Insurance Guarantee Association, *see* Cal. Ins. Code §§ 1063-1063.15, and similar guarantee associations in other states. *See generally* Richard R. Spencer, Jr., *Obligations of Guarantee Associations, in* ABA, *Law and Practice of Insurance Company Insolvency Revisited* 535 (1989). With respect to a "covered claim," *see* Cal. Ins. Code § 1063.1(c), the Guarantee Association assumes the insolvent insurer's duties under the insurance policy. *Id.* § 1063.2. The Association then is deemed to be an assignee of the policyholder's rights against the insolvent insurer, *id.* § 1063.4(b), and its claims (and claims of similar associations in other states) have equal priority with policyholders' uncovered claims, *id.* § 1033(a)(5). The liquidation statute provides the various state guarantee associations early access to their expected share of the insolvent insurer's estate. *Id.* § 1035.5(a). The Guarantee Association obtains funds by assessing premiums against its members, *id.* § 1063.5, which consist of the insurance companies licensed to do business in the state, *id.* § 1063(a).

On February 24, 1987, the same court issued liquidation orders for these companies. Pet. App. 119a, 121a, J.A. 23-34.[4]

In the Mission conservation and liquidation proceedings, the Liquidator has requested and obtained at least eleven separate orders from the California Superior Court expressly authorizing him "to initiate such equitable or legal actions or proceedings *in this or other states* as may appear to him necessary to carry out his functions as Liquidator [or Conservator]." Pet. App. 118a, 121a; J.A. 10, 13, 16, 19, 22, 25, 28, 31, 34 (emphasis added). Those orders also state that all persons are enjoined from, among other things, interfering with the "possession, title and rights" of the Liquidator "in and to the assets of Respondent," and from "instituting or prosecuting any action or proceeding against" the Mission companies or their Liquidator without the consent of the court. Pet. App. 117a, 120a; J.A. 9, 12, 15, 18, 24, 27, 30, 33.

Pursuant to the liquidation orders, the Liquidator commenced the winding up of the Mission companies' business. Allstate has filed claims with the Liquidator for amounts the Mission companies owed it under various reinsurance contracts.[5]

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[4] The Liquidator improperly includes in his Statement of the Case numerous allegations of fact that have no support in the record, including the repeated charge that Mission's reinsurers caused its insolvency. That allegation is irrelevant to the issues before the Court; in any event, if made against Allstate, it would be vigorously denied. *See* Subcomm. on Oversight & Investigations of House Comm. on Energy & Commerce, *Failed Promises: Insurance Company Insolvencies*, Committee Print 101-P, 101st Cong., 2d Sess., 11-19 (1990) (Mission's inslovency is "tale of reckless and incompetent management").

[5] Reinsurance is insurance for insurance companies. Reinsurance permits an insurer to spread its insurance risk by assigning (or "ceding") portions of the risk to other insurance companies acting as reinsurers in exchange for a share of the premiums. *See generally Colonial Am. Life Ins. Co. v. Commissioner of Internal Revenue*, 491 U.S. 244, 246-247 (1989); Henry T. Kramer, *The Nature of Reinsurance* 4-6, in *Reinsurance* (Robert W. Strain ed. 1980). As is common in the industry, Mission both provided reinsurance to other companies and sought reinsurance for its own obligations. Pet'r Br. 2, 5, 10 & n.25, 12 & n.30. Allstate notes that the two proofs of claim seeking "contingent and undetermined" amounts included in the Joint Appendix, J.A. 153-164, were not part of the record in the District Court, were attached to the Liquidator's Petition for Rehearing in the Court of Appeals over Allstate's objection, J.A. 177 n.4, and have since been superseded in the liquidation proceeding.

C. The Suit Against Allstate

On February 9, 1990, the Liquidator filed the present suit against Allstate in the California Superior Court for Los Angeles County. J.A. 35-61. The complaint includes two counts: for damages for alleged breach of certain reinsurance contracts, and for a declaratory judgment that Allstate is obligated to "pay or make provision to pay" the money allegedly owed under those contracts. J.A. 51-53.[6]

The Liquidator's claims against Allstate arise under several thousand separate reinsurance contracts entered into between Allstate and some of the Mission companies between 1961 and 1985. J.A. 98. Virtually all of these reinsurance contracts contain agreements providing that disputes arising under the contracts shall be settled by arbitration.[7]

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[6] The complaint also asserts the same claims against 19 other named reinsurers and 1000 alleged reinsurers denominated "Does 1 through 1000." J.A. 51-53. It asserts tort claims against "Does 500 through 1000," but not against any named defendants. J.A. 53-59. Together with the Complaint, the Liquidator filed a Notice of Related Cases, seeking to have this suit assigned to Judge Kurt J. Lewin, to whom the Mission liquidation proceeding, as well as an earlier suit against a number of Mission's reinsurers, had been assigned. J.A. 62-63.

[7] Reinsurance "treaties" cover large classes of business; "facultative certificates" cover single risks. Clauses providing for binding arbitration are contained in each of the approximately 26 treaties ceding risks from Mission to Allstate, and each of the approximately 41 treaties ceding risks from Allstate to Mission. J.A. 97-98. The remaining contracts at issue are facultative certificates, almost all of which also contain agreements for binding arbitration. J.A. 97, 99.

Allstate has served no answer in the action and therefore has not had occasion to state its defenses. Allstate believes that approximately $7 million in reinsurance balances is claimed by Mission under the contracts, subject to the defenses and setoffs that Allstate may assert. Allstate disputes the validity of these claims and intends to assert, among other defenses, that it is entitled to set off against these claims approximately $24 million in reinsurance balances that is due to Allstate from Mission as Allstate's reinsurer under other contracts. Cal. Ins. Code § 1031.[8]

On August 2, 1990, Allstate timely removed the Liquidator's breach of contract suit to the United States District Court for the Central District of California based on diversity of citizenship.[9] Allstate then moved under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, to compel arbitration under the reinsurance agreements and to stay the litigation pending arbitration. J.A. 77. The Liquidator moved to remand the case to state court based on abstention and lack of jurisdiction.

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[8] Some of the contracts name Northbrook Insurance Company, which later changed its name to Northbrook Excess and Surplus Insurance Company ("NESCO"), as the ceding insurer. NESCO, a former subsidiary of Allstate, was merged into Allstate in January 1985, and Allstate assumed all of NESCO's assets and liabilities. J.A. 96-97.

[9] Allstate's co-defendant Insurance Company of North America ("INA") also joined in the motion. Allstate and INA, which were the only two defendants served with process, Pet. App. 15a, removed the action to federal court on the ground that there was diversity of citizenship between themselves and the Liquidator, 28 U.S.C. § 1332(a), and that the claims asserted against Allstate and INA were separate and independent of the claims against nondiverse defendants, permitting removal under 28 U.S.C. § 1441(c) (1988 ed.), which had not yet been amended to limit such removals to claims giving rise to federal-question jurisdiction under 28 U.S.C. § 1331. J.A. 73, 76. The Liquidator subsequently filed a notice of dismissal of all defendants except Allstate and INA, and Allstate and INA then filed a supplemental notice of removal based on complete diversity between the Liquidator and themselves as the only remaining defendants. J.A. 111-115. INA later settled and was dismissed from the case.

Without deciding Allstate's arbitration motion, the District Court entered an order remanding the case to the state court. Pet. App. 13a-34a. The District Court concluded that it had jurisdiction but should abstain from exercising that jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Although Allstate had not filed an answer to the complaint, the District Court relied heavily on its expectation that the central issue in the case would be Allstate's anticipated defense of setoff and its understanding that the state-court judge had previously dealt with setoff issues in connection with the Mission insolvency. Pet. App. 14a-15a, 25a-26a, 31a, 33a, 34a. It ignored Allstate's argument, among others, that abstention was inappropriate in the face of a motion under the Federal Arbitration Act.[10]

Allstate filed a timely appeal from the remand order to the United States Court of Appeals for the Ninth Circuit.[11] The Liquidator filed a motion to dismiss the appeal, which was denied. Br. Opp. Pet., App. 1a-2a. On February 2, 1995, a unanimous panel of the Court of Appeals reversed the District Court's order of remand. *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, Pet. App. 1a-12a.

After holding "that a remand order based on abstention" is "a final collateral order that is reviewable on appeal," 47 F.3d at 353, Pet. App. 5a-6a, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 11-13 (1983), the Court of Appeals then concluded that abstention was not appropriate in this case. The court reasoned that the *Burford* doctrine, which finds its justification in the discretionary powers of a federal court sitting in equity, should not

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[10] Def. Mem. of Law in Opp. to Motion to Remand, 22, 23; Def. Supp. Mem. of Law Respecting Motion to Remand, 7.

[11] Allstate requested, in the alternative, that its appeal be treated as a petition for writ of mandamus if that Court found that it lacked appellate jurisdiction. App't Opening Br. 2, n. 1; App't Br. Opp. Motion to Dismiss Appeal 11-12 & n.6.

be extended to actions at law for the recovery of contract damages. 47 F.3d at 354-56, Pet. App. 8a-12a.

On February 16, 1995, the Liquidator filed a petition for rehearing and suggestion for rehearing *en banc*, which the Court of Appeals denied on May 19, 1995. Pet. App. 35a-36a. On August 11, 1995, the Liquidator petitioned this Court for a writ of certiorari, which the Court granted on October 16, 1995. 116 S. Ct. 334.

SUMMARY OF ARGUMENT

This case is about the duty of the federal courts to exercise the jurisdiction conferred on them by Congress. The Courts of Appeals have appellate jurisdiction over appeals from all "final decisions" of the District Courts. 28 U.S.C. § 1291. The District Courts have original jurisdiction over cases between parties of diverse citizenship. 28 U.S.C. § 1332. In both instances, the federal courts lack the authority to refuse to exercise the jurisdiction that Congress has conferred. *E.g.*, *New Orleans Public Service Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989).

I. Because the District Court remanded the case to state court based on the nonstatutory ground of abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), it is uncontested that the bar to appellate review of statutory remand orders, 28 U.S.C. § 1447(d), does not apply. *Things Remembered, Inc. v. Petrarca*, 64 U.S.L.W. 4035 (U.S. 1995); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Appellate jurisdiction is therefore governed solely by the principles of finality embodied in 28 U.S.C. § 1291.

A remand based on the *Burford* doctrine satisfies the most basic principles of finality because it ends the litigation in the District Court and leaves that court with nothing further to do. Because the remand order here put Allstate "effectively out of federal court"—indeed, put Allstate expressly and literally

out of federal court—it was final and appealable under § 1291. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983).

The suggestion in *Thermtron* that a remand order is not final, which was made without the benefit of briefing and argument by the parties on the issue, relies on a 19th-century case applying an understanding of finality that is flatly inconsistent with this Court's modern cases. The finality of an abstention-based remand is no different from that of an abstention-based dismissal because both have the same effect: the surrender of jurisdiction to a state court. Congress has created no exception to § 1291 beyond the review bar of § 1447(d), and this Court should not do so.

Even if the remand order were not final in the usual sense, it would be final and appealable under the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Because the issue of *Burford* abstention is an important question completely separate from the merits of arbitrability and the underlying contract claims, and because the District Court conclusively determined the abstention question in a way that is effectively—indeed, completely—unreviewable on appeal from the final judgment, the remand order is appealable as a final collateral order. *E.g.*, *Moses H. Cone*, 460 U.S. at 11-13.

II. The Court of Appeals correctly reversed the District Court's abstention order. As this Court made clear in *NOPSI*, "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred," 491 U.S. at 358, and may exercise their discretion to deny "certain types of relief" only in narrow and "carefully defined" areas, *id.* at 359. The *Burford* doctrine permits a federal court to refuse equitable relief that would restrain or interfere with a state administrative proceeding or decision only where granting relief would disrupt state policymaking processes by displacing specialized state-court review on matters of peculiarly local concern. *E.g.*, *id.* at 361-362.

Here, however, Allstate is not seeking to restrain or interfere with the Liquidator's performance of his duties; the Liquidator is suing to collect money from Allstate. In addition, the Liquidator's role in this suit is not that of an impartial state regulator pursuing administrative policymaking, but a trustee for the private interests of the Mission companies pursuing contract claims on their behalf. The issues involved, moreover, are not "distinctively local." There is therefore no basis to apply the *Burford* doctrine.

Even setting aside the carefully defined criteria of *Burford*, Allstate's defense of this action in federal court in no way compromises any state interests. First, removal of the Liquidator's suit to federal court does not interfere with any state statutory scheme. California law does not purport to concentrate all litigation involving an insolvent insurer in a single forum. Even if California had sought to do so, this Court has repeatedly held that subjecting a receiver to *in personam* claims outside the receivership court does not interfere with the receiver's functions or the receivership court's administration of the insolvent's estate. *E.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989); *Morris v. Jones*, 329 U.S. 545 (1947). The interest of convenience, which any litigant could assert, cannot overcome the statutory right to federal jurisdiction.

Second, the presence of state law issues, whether settled or otherwise, is also no reason to abstain from hearing a case within the court's diversity jurisdiction, which obviously contemplates that a federal court will decide state-law issues. *E.g., Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943). If the District Court reaches the state-law issues here, it will only have to decide ordinary issues of contractual interpretation, contractual and common-law defenses, the statutory right of setoff, and whatever other issues the parties may raise. The possibility of inconsistent adjudications in different cases raising similar issues, which is inherent in any multicourt system, provides no reason to abstain.

At a minimum, the District Court had no discretion to abstain in the face of Allstate's motion to compel arbitration under the Federal Arbitration Act. The enforceability of arbitration agreements is a matter of *federal* law, *e.g., Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), and a decision on an arbitration motion therefore cannot conceivably disrupt the development of coherent *state* policy. Allowing a party to delay the resolution of an arbitration motion with "prearbitration litigation" about abstention, *id.* at 843 (O'Connor, J., concurring), would frustrate "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22.

ARGUMENT

I.

THE DISTRICT COURT'S ORDER REMANDING THE CASE TO STATE COURT WAS REVIEWABLE ON APPEAL

The jurisdiction of the federal courts is defined by Congress, and the judiciary has no authority to expand or contract that jurisdiction. *New Orleans Public Service, Inc. v. Council of the City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). Section 1291 of the Judicial Code provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Thus, the reviewability by appeal of the District Court's order remanding this case to state court is governed solely by the principles of finality embodied in 28 U.S.C. § 1291.[12]

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[12] As the Liquidator concedes, Pet'r Br. 18, 21-22, 29-30, the review bar of 28 U.S.C. § 1447(d) does not apply here. This Court held in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-346

Because the District Court's order effectively put Allstate out of federal court, the Court of Appeals correctly held that the order was final and appealable under § 1291 as construed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). *See* Pet. App. 4a-8a. As *Moses H. Cone* makes clear, the District Court's order is final for purposes of § 1291 whether the order is treated as a final judgment in the usual sense or as a final collateral order under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[13]

A. The District Court's Remand Order Was Appealable As a Final Decision Under 28 U.S.C. § 1291.

There can be no question that a District Court's decision to *dismiss* a case on abstention grounds is final and appealable. *See, e.g., NOPSI*, 491 U.S. at 358; *see also Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (order quashing service of process for lack of personal jurisdiction). The prospect of subsequent litigation in state court, which an abstention-based dismissal is designed to make possible, does not deprive the dismissal of finality. Section 1291, after all, provides an appeal from the United States District Court to the United States Court of Appeals.

(1976), and recently reaffirmed in *Things Remembered, Inc. v. Petrarca*, 64 U.S.L.W. 4035 (1995), that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." 64 U.S.L.W. at 4036, citing 423 U.S. at 345-346. *Burford* abstention is an extrastatutory ground for removal; it does not appear in 28 U.S.C. § 1447(c). The only grounds for remand specified in that provision are a "defect in removal procedure" or "lack[ ] [of] subject matter jurisdiction." 28 U.S.C. § 1447(c); *see Things Remembered*, 64 U.S.L.W. at 4036.

[13] Allstate asked the Court of Appeals to issue a writ of mandamus in the event an appeal did not lie. *See* note 11, above. If this Court concludes that review by appeal was unavailable, it should either affirm the judgment below on the alternative ground that the District Court's decision warranted issuance of the writ, *see* note 21, below, or remand the case to the Court of Appeals with directions to address the petition for mandamus.

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 351-57 (1988), this Court held that, notwithstanding the absence of express statutory authorization, the district courts have authority to remand a removed case to state court on grounds that would otherwise permit the court to dismiss the case. 484 U.S. at 357. The District Court exercised that authority here. If a district court has authority to remand instead of dismissing upon holding that it should abstain under the *Burford* doctrine, its decision exercising that authority must be subject to appeal pursuant to § 1291 if it is a "final decision" within the meaning of that section.

There can be no question that it is. The District Court's order of remand here had precisely the same effect as a dismissal: it definitively and finally put an end to proceedings in the District Court. Just as with a dismissal, the remand order here was literally the "final"—that is, the last—decision the District Court can or will make absent appellate reversal. Because the order " 'ends the litigation on the merits and leaves nothing for the court to do,' " it is final and appealable under 28 U.S.C. § 1291. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). In other words, Allstate must be permitted an appeal now because if it is not, it will be wholly deprived of its right to appeal the District Court's *Burford* ruling. *See Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1935) (federal court's order dismissing defendant's third-party complaint final and immediately appealable because remand of case to state court rendered it otherwise unreviewable). Surely a remanded party's right to an appeal should not turn on the District Court's decision to remand rather than dismiss, when the effect in either case is to surrender jurisdiction to the state court.

This Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), reinforces that conclusion. In *Moses H. Cone*, one of the parties

had brought suit in federal court to compel arbitration pursuant to § 4 of the Federal Arbitration Act, 9 U.S.C. § 4. The District Court, invoking the doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), stayed the suit on the ground that a pending state-court suit also raised the issue of the arbitrability of the dispute between the parties. This Court held that the stay order was an appealable "final decision" because it put the defendant " 'effectively out of court' " and was therefore tantamount to dismissal. *Moses H. Cone*, 460 U.S. at 10, quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). The availability of the state court to adjudicate the arbitrability issue did not impair the finality of the stay order. As the Court explained, "a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata." *Id.* at 10. In other words, " 'effectively out of court' means effectively out of *federal* court—in keeping with the fact that the decision under appeal is the refusal to exercise *federal* jurisdiction." *Id.* at 9 n.8 (emphasis in original).[14]

The Court observed in *Moses H. Cone* that the finality of the stay order there was "even clearer" than that of the *Pullman* stay order found to be final in *Idlewild* given the prospect that a *Pullman* stay might be lifted should the plaintiff not obtain state-law relief in state court. 460 U.S. at 10. The finality of the District Court's remand here is clearer still. This case, unlike *Moses H. Cone*, does not require the Court to assess the practical effect of the District Court's order; by definition, the function of a remand is "precisely to surrender jurisdiction of a federal suit to a state court." *Id.* at 10-11 n.11. Allstate is not just "effectively" out of federal court; it is expressly and literally so.

[14] The Liquidator repeatedly, albeit cryptically, suggests that Allstate may be able to resort to federal court at some time in the future. Pet'r Br. 18, 25, 26. He does not trouble, however, to identify the route back to federal court he has in mind.

To avoid the holding of *Moses H. Cone*, the Liquidator points to the earlier statement in *Thermtron* that

> this Court has declared that because an order remanding a removed action does not represent a final judgment reviewable by appeal, "[t]he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

Thermtron, 423 U.S. at 353, quoting *Railroad Co. v. Wiswall*, 23 Wall. (90 U.S.) 507, 508 (1875). In effect, the Liquidator argues that by a single sentence in *Thermtron*, this Court intended to carve out an exception from the most basic principles of § 1291 finality for remand orders not subject to the bar of § 1447(d).

The *Thermtron* sentence cannot bear that weight. To be sure, *Thermtron*'s assumption that the remand order there was not final, and hence not appealable, was necessary to the Court's conclusion that mandamus was the proper remedy in that case. But whether the District Court's order in *Thermtron* was reviewed by mandamus or appeal, the ultimate result would have been the same: the remand order would have been set aside and the District Court would have been directed to proceed with the case. Thus, the statement is effectively dictum in the sense that it did not affect the substantive outcome of the case. The statement is not supported by any articulated reasons and was made without the benefit of briefing or argument by the parties.[15]

[15] Apart from the one sentence quoting *Wiswall*, the entire discussion of remedy in *Thermtron* concerns the undoubted availability of mandamus in the circumstances of the case. 423 U.S. at 352-53. Neither party in *Thermtron* suggested that the District Court's remand order might be a final order reviewable by appeal under 28 U.S.C. § 1291: the petitioners argued only that mandamus was an appropriate remedy for the refusal of the District Court to proceed, *see Thermtron* Pet'r Br. (No. 74-206) 17-18, while the respondent argued that § 1447(d) barred all forms of review, *see Thermtron* Resp. Br. 4. *See also* Tr. *Thermtron* Oral Arg. Nor was the issue considered in *Cohill*. *See* 484 U.S. at 347-48 & n.4; *Cohill* Pet'r Brief (No. 86-1021); *Cohill* Resp. Br.; Tr. *Cohill* Oral Arg.

Rather, the *Thermtron* statement rests entirely on the *Wiswall* case, a three-sentence opinion from 1875 that is wholly inconsistent with modern notions of finality. *Wiswall* dismissed, "upon the authority of *Insurance Company v. Comstock*," a writ of error to review a remand order on the grounds that the order was "not a 'final judgment' in the action but a refusal to hear and decide." *Wiswall*, 23 Wall. at 508, citing *Insurance Co. v. Comstock*, 16 Wall. (83 U.S.) 258 (1872). In *Comstock*, this Court held that the Circuit Court's *dismissal* of a case (itself a writ of error to the District Court) for lack of jurisdiction was a refusal to proceed and therefore reviewable by mandamus, not writ of error. *Id.* at 270-271.

As *Comstock* and the other cases cited in *Wiswall* make clear,[16] that case does not reflect a distinction between remands, on the one hand, and dismissals or other orders, on the other, but a broader rule about the respective functions of mandamus and error or appeal. These cases form part of a long line of 19th-century precedents in which mandamus was held the appropriate remedy where a lower court had dismissed a case at the outset of proceedings for lack of jurisdiction or had otherwise refused to proceed. *See In re Pennsylvania Co.*, 137 U.S. 451, 452-453 (1890) (collecting and explaining cases); *Ex parte Russell*, 13 Wall. (80 U.S.) 664, 670 (1871); P. Phillips, *The Statutory Jurisdiction and Practice of the Supreme Court of the United States* 276 (2d ed. 1872).[17] These decisions did not make review of this category of decisions less accessible, but simply required use of the correct writ: mandamus for a "refusal to hear and decide," error or appeal for a "final judgment."[18] If the lower court had jurisdiction but decided not to proceed, mandamus issued as a matter of course.[19]

"It should be apparent that th[ese] antique decision[s] provide[ ] little basis for determining what finality rules should

16 Each of the cases cited in the margin to *Wiswall*, 23 Wall. at 508 n.†, also supports the notion that mandamus was the proper remedy to correct an erroneous dismissal. *Ex parte Bradstreet*, 7 Pet. (32 U.S.) 634, 647-650 (1833) (granting mandamus to correct District Court's erroneous dismissal of action for lack of subject-matter jurisdiction); *Ex parte Newman*, 14 Wall. (81 U.S.) 152, 165 (1872) (stating in dictum that mandamus lies where lower court "refuses to hear and decide the controversy"); *The King v. Justices of Gloucestershire*, 1 B. & A. 1, 109 Eng. Rep. 688 (K.B. 1830) (issuing mandamus to correct erroneous dismissal of appeal).

17 *See, e.g., Parker, petitioner*, 131 U.S. 221 (1889) (mandamus reversing dismissal of appeal for lack of jurisdiction); *Ex parte Parker*, 120 U.S. 737 (1887) (same); *Harrington v. Haller*, 111 U.S. 796 (1884) (similar to *Comstock*, relying on *Wiswall* and *Comstock*); *Ex parte Schollenberger*, 96 U.S. 369 (1878) (mandamus reversing order quashing service for lack of personal jurisdiction); *Ex parte Russell*, 13 Wall. at 669-670 (mandamus reversing dismissal, for lack of subject-matter jurisdiction, of motion for new trial); *Ex parte Bradstreet*, 7 Pet. at 647-650.

18 *See Wiswall*, 23 Wall. at 508 (because remand order was "refusal to hear and decide" rather than "final judgment," remedy was "by mandamus to compel action, and not by writ of error to review what has been done"); *Ex parte Russell*, 13 Wall. at 670 ("Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it?"); *Comstock*, 16 Wall. at 270 (mandamus, not error, was correct remedy because Circuit Court never "passed upon the questions as to the correctness or incorrectness of the rulings of the District Court"); *id.* at 271 ("Mandamus being the proper remedy, error will not lie"); Phillips, above, at 276 (quoting *Ex parte Russell*); *see also* Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 129-130 (1927) (likening error, certiorari, mandamus, prohibition and appeal to common-law forms of action).

19 *See* cases cited in note 17, above. In *Comstock*, the Court had held that "every party" has a "right" to the judgment of the lower court, that this Court "in such case *will* issue" mandamus "in a case where the subordinate court had improperly dismissed the case," and that the party there "would be entitled" to a remedy if it had asked for the proper writ. 16 Wall. at 270 (emphasis added); *see also* Phillips, above, at 270 ("well settled" that mandamus "is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims," quoting *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 97 (1860)).

be developed today." 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.11 at 701 n.13 (2d ed. 1992) (referring to *Comstock* as foundation for *Wiswall*). Under modern practice, a dismissal of a case at the pleading stage, even if it "amounts to a refusal to adjudicate the merits," is final and appealable. *Moses H. Cone*, 460 U.S. at 12; *see also, e.g., NOPSI*, 491 U.S. at 358; *Rosenberg Bros.*, 260 U.S. at 517. The District Court's "refusal to hear and decide" this case, *Wiswall*, 23 Wall. at 508, should be no less appealable simply because the Court chose to effect it by way of remand rather than dismissal.[20] *Wiswall* cannot survive *Moses H. Cone* and the modern principles of finality it represents.[21]

In short, there is no reason for this Court to follow superseded precedent based on "historical distinctions" that "produce[ ] arbitrary and anomalous results." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 285 (1988); *see id.* at 279-88 (repudiating *Enelow-Ettelson* interpretation of 28 U.S.C. § 1292(a)(1)). Congress has created no exception to § 1291 for reviewable remand orders, and this Court should not do so.

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[20] *See Corcoran v. Ardra Insurance Co.*, 842 F.2d 31, 34-35 (2d Cir. 1988) ("Under the surrender-of-federal-jurisdiction test used in *Moses Cone*, we wonder whether it can logically or prudently remain the rule that a reviewable remand order . . . is not reviewable by direct appeal").

[21] Given the *Comstock/Wiswall* function of mandamus, the application of *Wiswall* to reviewable remand orders today would require the Court to make clear that the writ readily issues whenever a district court improperly abstains. *See Thermtron*, 423 U.S. at 353 ("There is nothing in our later cases dealing with the extraordinary writs that leads us to question the availability of mandamus in circumstances where the district court has refused to adjudicate a case, and has remanded it on grounds not authorized by the removal statutes."). There is simply no reason, however, to permit 19th-century writ practice to interfere in that fashion with the normal application of § 1291.

B. Even If the District Court's Remand Order Were Not Final in the Usual Sense, It Would Be Appealable as a Final Collateral Order.

Even were *Thermtron* read to preclude treating the District Court's remand order as a "final judgment," 423 U.S. at 352-53, the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), would provide a separate and independent basis for treating the District Court's remand order as final under § 1291. In *Cohen*, this Court "carved out a narrow exception to the normal application of the final judgment rule, which . . . considers as 'final judgments,'" certain decisions "even though they do not 'end the litigation on the merits,'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-99 (1989), quoting *Cohen*, 337 U.S. at 546. To qualify as a "final collateral order," an order must

> (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment."

Id. at 799, quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The collateral order doctrine counsels the Courts of Appeals to give § 1291 a "'practical construction.'" *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994), quoting *Cohen*, 337 U.S. at 546.

In *Moses H. Cone*, this Court held alternatively that the abstention-based stay order there was also final under the *Cohen* doctrine. 460 U.S. at 11-13. As the Court of Appeals held here, the District Court's order applying the *Burford* doctrine to remand this case to state court easily meets the *Cohen* three-part test. 47 F.3d at 353-54, Pet. App. 4a-8a.[22]

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[22] *See also Karl Koch Erecting Co. v. N.Y. Convention Ctr. Development Corp.*, 838 F.2d 656, 658-59 (2nd Cir. 1988) (remand on forum-selection clause grounds appealable); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3rd Cir. 1993) (same); *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1201-04 (5th Cir. 1991) (same);

The *Moses H. Cone* decision demonstrates why. *First*, in concluding there that the stay order conclusively determined the disputed question of *Colorado River* abstention, this Court held that the technical possibility that "every order short of a final decree is subject to reopening at the discretion of the district judge" did not deprive the stay order of finality. 460 U.S. at 12. Here, even that technical possibility is absent, because the District Court has completely removed the case from its control by remanding it to the state court. *See* 47 F.3d at 353, Pet. App. 6a.

Second, as the Court held in *Moses H. Cone*, "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits." 460 U.S. at 12. The remand order here, even more than the stay order in *Moses H. Cone*, is not a "step toward final judgment," but a refusal of the federal court to proceed at all. *Id.* at 12 n.13; *see* 47 F.3d at 353, Pet. App. 6a-7a.

Finally, there can also be no dispute that the District Court's remand order would be effectively unreviewable on appeal from a final judgment. *Moses H. Cone*, 460 U.S. at 12; Pet. App. 7a. Section 1291 concerns itself, of course, with appeals to the *federal* Courts of Appeal. The Court of Appeals here would have been powerless to review the remand order as part of a final judgment, for the simple reason that any final judgment would be rendered by a California state court. For that reason, the case does not raise any concern "that appellate review *now*" might "force the appellate court to consider approximately the same . . . matter more than once," *Johnson v. Jones*, 115 S. Ct. 2151, 2155 (1995) (emphasis in original). Appellate review of the abstention decision must occur now or not at all.

Regis Associates v. Rank Hotels (Management) Ltd., 894 F.2d 193, 194-95 (6th Cir. 1990) (same); *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 277-78 (9th Cir. 1984) (same); *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344-45 (10th Cir. 1992) (same).

To avoid the application of the collateral order doctrine, the Liquidator makes three arguments. *First*, the Liquidator argues that the District Court's remand order was not sufficiently conclusive because it did not resolve the issues of arbitrability and setoff. Pet'r Br. 17, 23, 24-25. For purposes of the *Cohen* doctrine, however, it matters not that the District Court did not resolve other issues, such as arbitrability and setoff, so long as the order sought to be appealed reflects a "conclusive determination" on the matter it *did* decide—that is, *Burford* abstention.[23]

Second, the Liquidator suggests that Allstate's right to a federal forum to hear this case is not sufficiently "important" to qualify as a final collateral order. Pet'r Br. 29. But even assuming that "importance" states an independent requirement of the *Cohen* doctrine, *but see Digital Equipment*, 114 S.

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[23] To support his argument that the remand order did not conclusively resolve the relevant questions, the Liquidator relies on the Second Circuit decision in *Corcoran v. Ardra Ins. Co.* 842 F.2d 31, 35 (2d Cir. 1988), which held that a remand order based on *Burford* abstention was not conclusive where the District Court had left unresolved the appellant's motion to compel arbitration, and the First Circuit decision in *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 862-64 (1st Cir. 1993), which followed *Corcoran*. But the reasoning of those two cases is flatly inconsistent with the holding of *Moses H. Cone*. There, the very proceeding in which the District Court had abstained was a petition to compel arbitration pursuant to § 4 of the Federal Arbitration Act. This Court expressly held that the stay order "conclusively determined" the issue sought to be appealed, which was not whether a court or an arbitrator would decide the contract dispute, but whether the state or the federal court would decide the arbitrability dispute. 460 U.S. at 12-13. Here too, the issue on which Allstate sought appeal below was whether the state or federal court would decide Allstate's motion to compel arbitration and, if necessary, the underlying liability issues. *See McDermott*, 944 F.2d at 1203 n.5 ("*Corcoran* is wrongly decided"); *Travelers Ins. Co. v. Keeling*, 996 F.2d 1485, 1489 (2d Cir. 1993) ("Perhaps it would have been possible in *Corcoran* to bring the remand ruling within the *Cohen* doctrine by considering the district court to have conclusively determined the threshold issue of which court (state or federal) would decide arbitrability").

Ct. at 2001, a decision by a District Court to depart from its "virtually unflagging" obligation to exercise its jurisdiction implicates sufficiently important federal rights to satisfy any such requirement, *see id.* at 2001-2003. Because the right Allstate asserts was conferred by Congress, *see* 28 U.S.C. §§ 1332, 1441, there is "little room for the judiciary to gainsay its 'importance.' " *Id.* at 2001.

Third, the Liquidator argues that the rule mandated by *Moses H. Cone* permits the " 'narrow exception' " of *Cohen* to " 'swallow the general rule' " because "remands . . . routinely occur." Pet'r Br. 24. The Liquidator misses the point. Limiting the types of orders that qualify as final collateral orders cannot be a goal in itself; the *Cohen* criteria themselves are designed to serve that function. Regardless of the frequency with which abstention-based remands occur, *Moses H. Cone* makes clear that a District Court's refusal on abstention grounds to adjudicate a matter within its jurisdiction finally determines an important federal right so as to qualify for appeal as a final collateral order.

II.

THE EXTRAORDINARY CIRCUMSTANCES JUSTIFYING *BURFORD* ABSTENTION CANNOT ARISE IN AN ACTION AT LAW ON A CONTRACT.

Within constitutional bounds, Congress has sole authority to define the jurisdiction of the federal courts. *New Orleans Public Service Inc. v. Council of the City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). Congress has given defendants in Allstate's position a statutory right to remove a case to United States District Court. 28 U.S.C. §§ 1332, 1441. From earliest days, this Court has emphatically stated that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *NOPSI*, 491

U.S. at 358; *see, e.g., Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 404 (1821) (Marshall, C.J.) ("to decline the exercise of jurisdiction [or] usurp that which is not given . . . . would be treason to the constitution").

While the Court has recognized that the federal courts' obligation to exercise their jurisdiction does not "eliminate [their] discretion in determining whether to grant certain types of relief" insofar as such discretion "was part of the common-law background against which the statutes conferring jurisdiction were enacted," *NOPSI*, 491 U.S. at 359, citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 570-77 (1985), it has simultaneously cautioned that that discretion is an "'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976), quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). Accordingly, the Court "ha[s] carefully defined . . . the areas in which such 'abstention' is permissible, and it remains ' "the exception, not the rule." ' " *NOPSI*, 419 U.S. at 359, quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River*, 424 U.S. at 813. In the absence of the "carefully defined" circumstances that might justify the exercise of discretion not to decide a given controversy, federal courts must remain faithful to their "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

The Liquidator's action for money damages on a series of contracts between Allstate and Mission presents no circumstance that might have justified the District Court's decision not to decide Allstate's motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 3-4, or, were that motion denied, the underlying liability disputes. The Court of Appeals correctly held that the District Court had no discretion to abstain under the principles of *Burford v. Sun Oil Co.*,

319 U.S. 315 (1943), and therefore properly reversed the District Court's order of remand.

A. The *Burford* Doctrine Applies Only to Actions Seeking to Review State Administrative Proceedings Where Such Review Would Interfere with State Policymaking Processes On Matters of Distinctively Local Concern.

The Court of Appeals' holding that the District Court had no discretion to decline to go forward with the action rests on a limitation that inheres in the very purpose and justification of the *Burford* doctrine. 47 F.3d at 354-56, Pet. App. 8a-12a.

In *Burford*, an oil company sued in United States District Court to enjoin enforcement of an order of the Texas Railroad Commission granting an oil-drilling permit to one of the company's competitors. 319 U.S. at 317 & n. 1. This Court held that "as a matter of sound equitable discretion," the District Court should "stay its hand." *Id.* at 318, 334.

The Court relied on two features of the Texas regulatory scheme at issue. First, given the local geological realities, the grant of any one permit directly affected every other present or prospective permitholder, so that each case had to be treated "as 'one more item in a continuous series of adjustments,'" *id.* at 332; *see id.* at 318-25 & nn.15-18. Second, Texas had entrusted the Commission with "broad discretion" in fulfilling its mandate to prevent waste in the Texas oil fields, and had concentrated direct review of the Commission's orders in a single county so that the state courts there exercised "judicial supervision of Railroad Commission orders," acquired "specialized knowledge," and became "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Id.* at 326-27. The Court rested its decision squarely on the discretion of a "federal equity court" to "decline to exercise its jurisdiction" when judicial restraint was "required by considerations of general welfare." *Id.* at 334, 333 n.29; *see NOPSI*, 491 U.S. at 360.

The Court came to the same result for the same reason in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), the only other case in which this Court has authorized a federal court to abstain in reliance on the *Burford* doctrine. In *Southern Railway*, this Court held that, "'as a matter of sound equitable discretion,'" the federal court should decline to review an Alabama Public Service Commission order refusing a railroad company permission to discontinue certain passenger service within the state. *Id.* at 345, quoting *Burford*, 319 U.S. at 318.

The Court stressed the same facts as in *Burford*. First, the Commission's order had required a balancing between the costs to the railroad company and the need for the local service. *Southern Railway*, 341 U.S. at 345-48. Second, the Alabama scheme concentrated review of the Commission's orders in a single county; appeals to the state court were "'supervisory in character,'" *id.* at 348 (citation omitted); and the court's review of the "administrative order [was] based upon predominantly local factors." *Id.* at 349. As in *Burford*, the Court stressed that, in declining to grant the injunction, the federal court would not be abdicating its responsibility to exercise its jurisdiction, but instead exercising the discretion of "a federal court of equity" to "stay its hand in the public interest when . . . private interests will not suffer . . . ." *Id.* at 350-51; *see NOPSI*, 491 U.S. at 360-61.

In *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), this Court confirmed the foundation of the *Burford* doctrine in the exercise of equitable discretion to avoid interference with state policymaking processes. There, a plaintiff in a tort action brought an action for money damages against the alleged tortfeasor's insurer under Louisiana's direct action statute. The Court easily rejected an argument based on the *Burford* doctrine that the case presented grounds for a "dis-

cretionary refusal to exercise jurisdiction" because of differing standards of review of jury verdicts in state and federal courts, pointing out that

> in *Burford*, jurisdiction was declined to avoid a potential for conflict with a state's policy-making process, a consideration not present here. Moreover, traditional equitable authority, not available here, was relied upon to justify the holding.

348 U.S. at 53.

Most recently, in *NOPSI*, the Court held that the *Burford* doctrine did not bar a suit in which a public utility sought to enjoin on federal preemption grounds the enforcement of the utility rate order of a local regulatory body. The Court first summarized the *Burford* doctrine:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S. at 361, quoting *Colorado River*, 424 U.S. at 814.

Applying the doctrine, the Court held that, notwithstanding the availability of state-court review of the order, the District Court had erred by refusing to hear the utility's claim. The Court explained:

> While *Burford* is concerned with protecting complex state administrative processes from federal interference, it does not require abstention whenever there exists such

> a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy.

Id. at 362, quoting *Colorado River*, 424 U.S. at 815-816. Where federal adjudication of the claim "would not disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem,' " *id.*, quoting *Alabama Pub. Serv. Comm'n*, 341 U.S. at 347, the resolution of which "demand[s] significant familiarity with . . . distinctively local regulatory facts or policies," *id.* at 364, there could be no basis for *Burford* abstention.

These cases establish at least two essential predicates to *Burford* abstention. *First*, the doctrine does not establish a general discretion in a federal court to depart from its obligation to decide cases whenever the court finds a sufficiently weighty state interest involved. Instead, the court's authority not to go forward is based on, and limited by, its discretion to withhold particular types of relief in particular circumstances, most importantly an equity court's discretion to withhold injunctive relief when the public interest calls for restraint. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-313 (1982). Absent equitable discretion to withhold such relief, there is no basis to apply the *Burford* doctrine.

Second, the *Burford* doctrine does not confer authority to abstain in every case in which the plaintiff seeks equitable relief from a state administrative order, but only in those rare circumstances in which the request to restrain enforcement of the order would require the federal court to displace the judgment of a state court, equally available to entertain the federal plaintiff's challenge, in an area that demands specialized knowledge of a local problem and coordinated treatment of interconnected cases. Absent a threat that federal injunctive relief would override a state administrative determination on a matter of peculiarly local concern, there is no basis to apply the *Burford* doctrine.

1. The District Court Had No Discretion to Abstain Because Allstate Sought No Injunctive Relief.

Allstate did not bring this lawsuit; the Liquidator did. Allstate simply removed the case to federal court. *See* 28 U.S.C. §§ 1332, 1441. In removing, Allstate did not attempt to restrain or interfere with the Liquidator's performance of his duties in any way, let alone seek review of an order of the Liquidator in any administrative capacity. Nor will Allstate's defense of the action restrain the Liquidator in any way. Allstate intends simply to pursue its motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 2-4, and to pursue such defenses as are just and well-founded. The *only* effect on the Liquidator of Allstate's assertion of its federal right to remove the case is that a federal court, rather than the state court in which the Liquidator originally filed the suit, will adjudicate the motion to compel arbitration and, if necessary, the Liquidator's contract claims.

Thus, as the Court of Appeals held, the relief Allstate seeks in defending the action—either a stay of the litigation so that arbitration might be had or, failing that, setoff or denial of the Liquidator's contract claims on the merits—is alone dispositive of the District Court's discretion to abstain on *Burford* grounds. Because Allstate, the defendant here, seeks no injunctive or other equitable relief to review or restrain the conduct of an administrative agency on a matter of peculiarly local concern, the District Court had no equitable discretion to exercise in determining whether to go forward. *See NOPSI*, 491 U.S. at 360-62.[24] In other words, by definition, a fundamental requirement of the *Burford* doctrine cannot be met in a contract action for money damages brought against a private citizen.[25]

[24] *See also Fragoso v. Lopez*, 991 F.2d 878, 882 & n.6 (1st Cir. 1993); *Tribune Co. v. Abiola*, 66 F.3d 12, 15-17 (2d Cir. 1995); *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 271-272 (3d Cir. 1991); *Todd v. DSN Dealer Service Network, Inc.*, 861 F. Supp. 1531, 1541 (D. Kan. 1994); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 (D. Vt. 1993); *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1223 (D. Md. 1992), *aff'd*, 37 F.3d 1036 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 1251, *cert. dismissed*, 115 S. Ct. 2272 (1995).

By making clear that the *Burford* doctrine is available only to federal courts that are "sitting in equity" and therefore must "determin[e] whether to grant certain types of relief," *NOPSI*, 491 U.S. at 359, this Court has not revived some antiquated distinction between legal and equitable forms of pleading. *See* Pet'r Br. 19-21, 31-40. To the contrary, given that "federal courts lack any discretion to abstain from the exercise of jurisdiction that has been conferred," *NOPSI*, 491 U.S. at 358, the Court has simply instructed that a district court must ground any decision not to entertain a claim in an identifiable source of authority to withhold relief.[26]

[25] Nor does the Liquidator's inclusion of a claim for declaratory relief in his complaint confer any discretion on the District Court. Unlike the situation in *Wilton v. Seven Falls Corp.*, 115 S. Ct. 2137 (1995), in which the defendant in a damages action had inverted the normal posture of the parties by filing a separate action seeking a declaration of nonliability, *id.* at 2139, the Liquidator's request for a declaration of liability simply recasts his request for damages in a different form. J.A. 51-53. The discretion that the Declaratory Judgment Act, 28 U.S.C. § 2201, gives a district court to withhold declaratory relief in appropriate circumstances, *see* 115 S. Ct. at 2143, surely does not authorize the court to accede to a declaratory judgment *plaintiff*'s request that the *defendant* not be permitted to remove the action—including the claims at law for contractual damages—to federal court. *See id.* (request for declaratory judgment as exception to "the normal principle that federal courts should adjudicate claims within their jurisdiction"). The Liquidator's contention that a declaratory judgment action is always considered "equitable" is thus irrelevant; in any event, he has waived the argument, *see* J.A. 171, which is plainly wrong under both federal and California law, *see* J.A. 172-175.

[26] The Liquidator's discussion of the formal merger of law and equity in the Federal Rules of Civil Procedure, Pet'r Br. 33-34, is therefore irrelevant. Those Rules are procedural only and have no effect on substantive law. *See* 28 U.S.C. § 2072(b) (federal rules "shall not abridge, enlarge or modify any substantive right"); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26 (1949). For the same reason, the Liquidator misses the point when he argues that a court that abstains should always

For that reason, the Liquidator undertakes a meaningless task when he seeks support in several decisions of this Court in which, he contends, the Court approved "abstention" in actions at law. Pet'r Br. 35-40. None of these decisions provides the Liquidator any support.

The Liquidator first points to three cases applying the *Pullman* doctrine: *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (*per curiam*) (approving *Pullman* deferral without discussing nature of action or relief sought); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962) (*per curiam*) (same); and *Clay v. Sun Ins. Office*, 363 U.S. 207 (1960) (suggesting certification of question to state supreme court based on *Pullman*-like reasoning). Under that doctrine, a district court may defer consideration of a federal constitutional challenge to a state statute in order to give the state courts an opportunity to give the statute a saving construction. *See Railroad Comm'n v. Pullman* 312 U.S. 496 (1941); *Growe v. Emison*, 113 S.Ct 1075, 1080 n.1 (1993) (*Pullman* doctrine calls for "deferral," not "abstention"). The accomplishment of that objective, unlike the *Burford* objective of avoiding interference with administrative proceedings, does not depend on the nature of the relief sought in the action in which the constitutional issue arises. The absence of a request for equitable relief is therefore not relevant to the scope of the *Pullman* doctrine.

Similarly, in authorizing *Pullman*-like deferral in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-31 (1959) (citing *Pullman* but not *Burford*), this Court simply recognized that principles of restraint prevailing in "conventional equity suits" also applied in the context of an eminent domain proceeding where necessary to allow the Louisiana courts to settle the question whether the city that

be regarded as exercising its equitable jurisdiction in doing so. Pet'r Br. 40-42. The authority to abstain turns not on a label arbitrarily placed upon that authority but on the relief in response to which the authority is exercised.

had exercised eminent domain authority actually had such authority under Louisiana law.[27] So too, in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 111 (1981), the Court held only that the longstanding principle of comity that had "led federal courts of equity to refuse to enjoin the collection of state taxes" and "require[d] a like restraint in the use of the declaratory judgment procedure" also barred a suit for damages under 42 U.S.C. § 1983 based on a claim that the state's administration of its tax system was unconstitutional. The *McNary* Court's extension of the principle against enjoining state tax collection to a § 1983 damages action was expressly based on its conclusion that in order to award damages, the district court would effectively have to make a " 'declaration' " of unconstitutionality that "would halt the administration of the state tax system" and "would be fully as intrusive" as the injunctive or declaratory relief barred under

[27] The Court emphasized that an eminent domain proceeding, while technically legal, was both "special and peculiar" and "intimately involved' with sovereign prerogative." 360 U.S. at 28. The basis—and limited scope—of *Thibodaux* is made clear by this Court's reversal, on the same day and on virtually identical facts, of an abstention order in a case in which the county's power of eminent domain was clear under state law. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-197 (1959).

In dictum in *Ankenbrandt v. Richards*, 504 U.S. 689, 705-706 & n.8 (1992), the Court speculated that it was "not inconceivable" that a federal court might stay a case before it to allow a state court to rule on a question of state law, the "public import" of which "transcend[ed] the case at bar," if the relief sought by the federal plaintiff required the court to rule as if issuing a divorce, alimony, or child custody decree. The *Ankenbrandt* Court's speculation about deferring on an issue relating to the status of a domestic relationship provides no support for the suggestion that *Burford* might apply to this contract action. Pet'r Br. 38-39. The *Ankenbrandt* dictum cautioned only against invading the realm of divorce, alimony, and child custody decrees, each of which involves a court's equitable powers and, as the *Ankenbrandt* Court itself held, falls outside diversity jurisdiction. *Id.* at 693-704. And, of course, *Ankenbrandt* held that *Burford* abstention was inappropriate in the tort action before it.

the principles of comity applicable to constitutional attacks on state tax systems. *Id.* at 115, 113; *see id.* at 107-117.

The Liquidator also cites *Langnes v. Green*, 282 U.S. 531, 541-544 (1931), which was not at law but in admiralty. In ordering the dissolution of an antisuit injunction in order to allow a common-law claim to go forward in state court, the Court expressly rested on the discretionary powers of an admiralty court in a limitation-of-liability proceeding, which is akin to a proceeding in equity to distribute a limited fund. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* §§ 10-8, 10-17 to 10-19 (2d ed. 1975).

Finally, Congress's decision in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, to allow states to regulate the business of insurance, *see* Pet'r Br. 4, 45-47, provides no grounds to apply *Burford*. As *NOPSI* makes clear, the mere presence of state regulatory interests provides no grounds to abstain. 491 U.S. at 362; *see Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 960 (3d Cir. 1993).[28]

[28] Contrary to the Liquidator's suggestion, Pet'r Br. 47 n.87, the reference to the McCarran Amendment, 43 U.S.C. § 666, in *Colorado River* does not support reliance on the McCarran-Ferguson Act here. The McCarran Amendment, which gave the consent of the United States to be sued in state court where certain water rights were in issue, was designed specifically to promote unified adjudication of water rights. *Colorado River*, 424 U.S. at 819. The McCarran-Ferguson Act, by contrast, has nothing at all to say about state-court jurisdiction, but only insulates certain state regulation of the business of insurance from federal preemption. 15 U.S.C. §§ 1011-1015.

As the District Court concluded, and the Liquidator has not since challenged, a *Colorado River* stay is unavailable here because there is no concurrent litigation. Pet. App. 22a-23a. The Liquidator's claims against Allstate are not pending in the state court, and Allstate's potential defense of setoff under Cal. Ins. Code § 1031 is a statutory right independent of its primary contract claims in the liquidation proceeding.

The Liquidator has not suggested here or in the courts below that the antipreemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), might apply of its own force to bar Allstate's removal. Nor could he: the California Insurance Code does not purport to bar the litigation of the Liquidator's claims in federal court, *see* Part II.B.1, below; and in any event, § 1012(b) would not protect a law purporting to displace diversity jurisdiction because, among other things, such a law would be "logically and temporally unconnected to the transfer of risk" under an insurance policy and therefore would not regulate the "business of insurance." *United Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 130 (1982); *see also United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2209 (1993). In enacting the McCarran-Ferguson Act to protect state laws regulating insurance from preemption, Congress did not intend to deprive the federal courts of jurisdiction to apply those laws.

In short, none of the authorities on which the Liquidator relies to establish that some species of "abstention" might be available in an action at law provides any support for the District Court's decision here that the *Burford* doctrine afforded discretion to refrain from deciding a contract action for money damages that the defendant had properly removed.[29]

[29] To the extent that the Liquidator's *amici curiae* The Council of State Governments and others intend to suggest that the District Court should have abstained on the authority of *Thibodaux* or *McNary* (Br. for *Amici* Council of State Gov'ts *et al.* 10-14), this Court should not entertain the suggestion. The Liquidator did not rely upon the analysis or holding of either case in either the District Court or the Court of Appeals, and he should not be permitted to urge a new ground here. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

In any event, neither *Thibodaux* nor *McNary* would support abstention in the circumstances here. First, there is no state-law issue remotely analogous to that which justified deferral of federal proceedings pending a state-court determination of state law in *Thibodaux*. *See* Part II.B.2, below; *see also* Part II.C, below. Equally, there is no principle of comity applicable to insolvency proceedings remotely analogous to that barring constitutional attacks on the administration of state tax systems found dispositive in *McNary*. *See* Part II.B.1, below. The caution *Thibodaux* and *McNary* reflect about challenges in federal court to core aspects of state sovereignty, such as eminent domain and taxation, has no application here. While the states undoubtedly have an important interest in insurance regulation, the administration of an insolvent's estate, unlike the power to tax or take property, is not central to its sovereign power. This case also differs from *Thibodaux* and *McNary* in that the authority of the Liquidator to act as receiver of Mission, and the validity of the state statutes authorizing him to act in that capacity, are not in question. This Court has warned against "concoct[ing] absention doctrine[s] out of whole cloth," *Ankenbrandt*, 504 U.S. at 706 n.8, and there is no reason to do so here.

2. The District Court Had No Discretion to Abstain Because Allstate Did Not Seek to Interfere with State Policymaking.

Allstate came to the District Court not to ask that it override an administrative determination made by the Insurance Commissioner in his role as impartial regulator acting in the public interest, but to defend itself against a commercial claim initiated in a state court of general jurisdiction by the Commissioner as Liquidator on behalf of private parties to whom he owes a fiduciary's duty of loyalty. Because the Liquidator was not acting in a regulatory capacity, there could be no prospect that Allstate's defense against the Liquidator's contract claims would interfere with state policymaking.

The character of the Liquidator's activity here—and the absence of circumstances giving rise to *Burford*'s concern for protecting certain *administrative* proceedings—is reflected in the nature of this action. To collect monies allegedly owed to an insolvent insurer by a third party, the Liquidator does not conduct an administrative proceeding, but commences an ordinary civil action. *Kinder v. Superior Court (Market Ins. Corp.)*, 78 Cal. App. 3d 574, 579, 144 Cal. Rptr. 291, 295 (1978); *Maloney v. Rhode Island Ins. Co.*, 115 Cal. App. 2d 238, 249, 251 P.2d 1027, 1033-34 (1953); *see* Cal. Ins. Code § 1037(f).[30] In that action, the Liquidator must prove facts and make legal arguments like any other litigant.[31] And the subject matter of such an action, which by the Liquidator's own

[30] The Liquidator brought this suit against Allstate as an independent action, and it bore a Superior Court docket number separate from that of the liquidation proceedings. See J.A. 35 (Complaint). The underlying liquidation proceeding, a "special proceeding," is also judicial, not administrative. Cal. Ins. Code §§ 1011 *et seq.*; *see also* Cal. Code Civ. Proc. §§ 22-23; Pet'r Br. 4.

[31] The defendant in an action brought by the Liquidator is entitled to all the protections of a plenary trial under California law, including the right to trial by jury if the action is at law and to findings of fact and conclusions of law if the case is tried to the bench. *Kinder*, 78 Cal. App. 3d at 581, 144 Cal. Rptr. at 296.

account might here have included claims against any one of hundreds of domestic reinsurers, as well as foreign reinsurers from at least 28 countries, Pet'r Br. 9-11 & n.25, 14 & n.33, is certainly not "distinctively local." *NOPSI*, 491 U.S. at 364.

Further, the Liquidator brings the action in pursuit of private pecuniary interests. The California insurance insolvency statute expressly provides that "[i]n all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate" of the insolvent insurer. Cal. Ins. Code § 1057; *see id.* §§ 1010-1062; *Texas Commerce Bank–El Paso v. Garamendi*, 28 Cal. App. 4th 1234, 1244, 34 Cal. Rptr. 2d 155, 161 (1994); *see also* Pet'r Br. 3, citing *Anderson v. Great Republic Life Ins. Co.*, 41 Cal. App. 2d 181, 188, 106 P.2d 75, 79 (1940). The caption on the Liquidator's papers confirms that he brings this action "in His Capacity as Liquidator and Trustee" of various trusts established in the stead of the insolvent Mission companies. Pet'r Br. 2 n.2. And the California Court of Appeal has confirmed that "the commissioner is a public official acting on behalf of the state when dealing with insolvent insurers in general, but once appointed conservator of a particular insolvent insurer, the commissioner steps into the shoes of that insurer." *Texas Commerce Bank*, 28 Cal. App. 4th at 1245, 34 Cal. Rptr. 2d at 162.[32]

Regardless of the Liquidator's status as fiduciary for private interests, the Liquidator's claim arises from a contract

[32] *Accord, e.g., Corcoran v. National Union Fire Insurance Co.*, 143 A.D. 2d 309, 532 N.Y.S.2d 376, 378 (1988) (Superintendent of Insurance acting as liquidator of insolvent insurance company "acts in a separate and distinct capacity from his role as regulator of the insurance industry," conducting insolvent's operations "for the benefit of its creditors and policyholders, as opposed to the benefit of the general public"); *Helvering v. Therrell*, 303 U.S. 218, 225 (1938); *Crawford v. Employers Reins. Co.*, 896 F. Supp. 1101, 1102 (W.D. Okla. 1995); *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671, 672 (Tex. App. 1987); *Matter of Kinney (Miller)*, 257 A.D. 496, 501, 14 N.Y.S.2d 11, 16, *aff'd*, 281 N.Y. 840, 24 N.E.2d 494 (1939).

right belonging to Mission's estate, *see Prudential Reins. Co. v. Superior Court (Garamendi)*, 3 Cal. 4th 1118, 1136-37, 842 P.2d 48, 59, 14 Cal. Rptr. 2d 749, 760 (1992),[33] and any recovery on the Liquidator's claim against Allstate will accrue to the benefit of the liquidation estate and hence to Mission's creditors.[34] The expenses of the liquidation, including the salary of a deputy liquidator who may supervise litigation and the fees of counsel who conduct it, are paid out of the assets of the receivership estate. Cal. Ins. Code §§ 1033, 1035. Because he is pursuing private claims, the Liquidator is treated as a private litigant. *See Texas Commerce Bank*, 28 Cal. App. 4th at 1245-46, 34 Cal. Rptr. 2d at 162.[35]

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[33] The Liquidator's suggestion, without citation to California authority, that Mission's insolvency transformed its contracts into "regulatory agreements" with a state official, Pet'r Br. 49, is both irrelevant and flatly contradicted by California law. *See Prudential Reinsurance*, 3 Cal. 4th at 1136-37, 842 P.2d at 60, 14 Cal. Rptr. 2d at 760 (rejecting argument that insolvency transmuted reinsurance contracts into agreements with regulator so as to defeat setoff rights).

[34] All fifty states have established statutory guarantee associations, funded by the insurance industry, to protect policyholders from the effect of insurance company insolvencies. *See* note 3, above. To the extent that policyholder claims are covered by guarantee associations, recovery of a claim by an insolvent insurance company benefits not its individual policyholders but the guarantee associations and the solvent insurance companies that constitute their membership.

[35] It is plain that the Insurance Commissioner, as Liquidator and Trustee pursuing the interests of the estate's creditors, could not simultaneously act as neutral regulator pursuing the general welfare of the people of California. *See Texas Commerce Bank*, 28 Cal. App. 4th at 1244, 34 Cal. Rptr. 2d at 161 (liquidator owes estate's creditors "a duty of loyalty, which has been interpreted to mean that the trustee must administer the trust *solely* in the interest of the beneficiary") (emphasis added). For example, a House subcommittee has concluded that the Liquidator here, in effect, turned a blind eye to substantial evidence of fraud by former Mission management so as not to compromise his chances of recovering against Mission's reinsurers. *See* Subcomm. on Oversight, *supra* note 4, at 62-63, 74. Regardless of whether former Mission management actually committed fraud or what conclusions the Liquidator reached on the matter, the Subcommittee Report highlights the inconsistency between a liquidator's obligation vigorously to defend against such allegations as representative of the insolvent insurer and the duty of an impartial regulator to root out fraud.

The *Burford* doctrine provides a shield to protect state policymaking processes conducted by administrative agencies on matters of local concern, not a sword to defeat diversity jurisdiction in private commercial litigation. Because Allstate's defense of this action poses no risk of "interference with [California's] administrative policy-making process," *Lumbermen's Mutual*, 348 U.S. at 53, the District Court had no discretion to abstain. *See NOPSI*, 491 U.S. at 360-62; *Tribune Co. v. Abiola*, 66 F.3d at 15-17; *Fragoso v. Lopez*, 991 F.2d at 882 & n.6.

B. Neither of the Interests the Liquidator Asserts Here May Defeat Allstate's Right to Invoke the District Court's Diversity Jurisdiction.

At bottom, the Liquidator's position here rests not on the carefully circumscribed *Burford* doctrine, but on an infinitely broader notion that a District Court should be permitted to abstain whenever the controversy before it arises in an area affected by state regulation. Not only would such a notion precipitate enormous amounts of wasteful litigation, as litigants found cause to urge abstention in the faintest whiff of a state interest, but it is flatly inconsistent with Congress's grant of diversity jurisdiction to the federal courts. But even if, as the Liquidator implicitly suggests, the *Burford* doctrine permitted a District Court to replace this Court's precisely delimited criteria with an *ad hoc* balancing of the state and federal interests present in each case, there would be no basis for abstention here.

1. The Liquidator's Preference for Consolidated Litigation Cannot Defeat Allstate's Right to Invoke Diversity Jurisdiction.

The Liquidator repeatedly argues that requiring him to pursue his suit against Allstate in federal court would "disrupt[ ]" California's statutory insolvency scheme, because, according to the Liquidator, that scheme "clearly contemplates . . . a single, integrated proceeding to devise and implement rehabilitation plans, to marshal assets, accept and adjudicate claims, and otherwise to protect policyholders." Pet'r Br. 21, 31. California law, however, could not and does not require concentration of all litigation in the liquidation court. And a long line of this Court's cases squarely refutes the notion that a liquidator or receiver has any reason to complain about the adjudication of claims involving the insolvent outside the liquidation or receivership proceeding.

As an initial matter, California does not have the constitutional authority to derogate from jurisdiction granted by Congress by claiming exclusive authority over suits relating to a given subject. *Pennsylvania v. Williams*, 294 U.S. 176, 180-82 (1935); *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189, 197 (1935); *see also Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318, 328-329 (1914). Equally, a state court does not have the constitutional authority to enjoin a party from pursuing an *in personam* claim in a federal court. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977); *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964).[36]

[36] While the Liquidator refers to the liquidation court's injunction, Pet'r Br. 8-9 & n.20, he does not argue that the injunction barred Allstate from removing this action. In any event, the liquidation court's injunction does not, by its own terms, apply to this suit, which was initiated by the Liquidator, *see, e.g.*, J.A. 9, 24, and Allstate could not now be precluded from challenging the injunction if it did, *see Martin v. Wilks*, 490 U.S. 755 (1989); *Underwriters Nat'l Assur. Corp. v. North Carolina Life Ins. Guar. Ass'n*, 455 U.S. 691 (1982).

Unsurprisingly, then, the California statutory scheme does not depend on the consolidation of all estate-related litigation in the liquidation court. The California Insurance Code authorizes the liquidator to "collect all debts due and claims belonging to" the insurer in liquidation, *id.* § 1037(b); authorizes him or her to "prosecute and defend any and all suits and other legal proceedings" involving the insurer, *id.* § 1037(f); and establishes jurisdiction in the liquidation court over any actions brought by or against the insurer, *id.* § 1058. Nothing in the statute, however, purports to require that all actions involving an insolvent insurer be brought in the same court in which the liquidation proceeding was commenced. *See Webster v. Superior Court (Gillespie)*, 46 Cal.3d 338, 343-53, 758 P.2d 596, 598-603, 250 Cal. Rptr. 268, 271-78 (1988) (liquidation court not required to enjoin proceedings against insolvent insurer in other courts); *accord Fabe v. Columbus Ins. Co.*, 68 Ohio App. 3d 226, 233, 587 N.E.2d 966, 970 (1990) (Ohio law). This case began in the same court in which the liquidation proceeding is pending only because the Liquidator, for his own convenience, chose to file it there.

At the Liquidator's own request, the Mission liquidation court has entered a series of orders providing "[t]hat the Liquidator is authorized to initiate such equitable or legal actions or proceedings *in this or other states* as may appear to him necessary to carry out his functions as Liquidator." *E.g.*, J.A. 10 (emphasis added). As conservator or liquidator of other insurers, the Commissioner has frequently availed himself or herself of the right to litigate in federal court and in courts of states outside of California.[37] Indeed, allowing liquidators

[37] *See, e.g., Gillespie v. Waite-Hill Assur. Ltd.*, No. 87-08504 RMT (Kx) (C.D. Cal. 1987) (Commissioner as liquidator of insolvent insurers sued to collect under reinsurance contract); *Garamendi v. Caldwell*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,861 (C.D. Cal. 1992) (Commissioner as liquidator of insolvent insurer sued for damages for fraud, negligent misrepresentation, and RICO violations); *Oakbrooke Assocs., Ltd. v. Insurance Comm'r of Cal.*, 581 So. 2d 943 (Fla. App.

access to other states' courts is one of the central purposes of the Uniform Insurers Liquidation Act, which California has adopted.[38]

Thus, the Liquidator's argument boils down to an assertion that in order to avoid interfering with the liquidation of an insolvent insurer, federal courts should cede to the liquidation court jurisdiction over any case involving that insurer. This Court has repeatedly rejected that assertion, holding to the contrary that the adjudication of ordinary contract claims involving a company in receivership does not interfere with the receiver's administration of the company's assets or the payment of its creditors. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 575-76 (1989); *Morris v. Jones*, 329 U.S. 545, 548-50 (1947); *United States v. Klein*, 303 U.S. 276, 281-83 (1938); *Riehle v. Margolies*, 279 U.S. 218, 223-25 (1929); *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (81 U.S.) 383, 401-02 (1872).

This Court has carefully delineated both the scope and limits of the principle of reciprocal comity that applies when one court, either federal or state, has taken jurisdiction *in rem* over specific property, as has the liquidation court over Mission's assets. "[T]he settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation," which is "applicable to both federal and state

1991) (Commissioner as liquidator of insolvent insurer sued in Florida state court to enforce assignment of rents and leases); *Nassau Square Assocs. v. Insurance Comm'r of Cal.*, 579 So. 2d 259 (Fla. App. 1991) (similar).

[38] *See* Prefatory Notes ¶2, in 13 U.L.A. 321, 322 (1986 ed.). The Uniform Act also authorizes insurance commissioners in other states to establish ancillary liquidation proceedings in which creditors can prove claims against the insolvent insurer, *see* note 1, above, in order to spare creditors residing in those states "the expense, annoyance and hardship of proceeding in the courts of the domicile of the insurance company." *Id.* ¶4, 13 U.L.A. at 323; *see* Cal. Ins. Code §§ 1064.3(b), 1064.4(b). The disposition of claims in such ancillary proceedings is binding on the California liquidation court. Cal. Ins. Code § 1064.4(b).

courts," is that "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." *Penn General Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935).[39] But "[w]here the judgment sought is strictly *in personam*, for the recovery of money or for an injunction," another court need not yield. *Penn General*, 294 U.S. at 195; *see Kline*, 260 U.S. at 230-31.

Applying this rule, this Court has held time and again that a federal court may not surrender jurisdiction over an *in personam* claim involving an insolvent estate simply because, as here, a state court has control over the *res*. For example, in *Morris v. Jones*, the Court held that in light of the requirements of full faith and credit, the Illinois Supreme Court had erred in upholding the disallowance of a claim in an insurance liquidation proceeding that had been based on a judgment rendered against the liquidator in a Missouri court. 329 U.S. at 550-54. The Court explained that the "establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court." 329 U.S. at 549. Thus, the Court held, "the notion that . . . control over

[39] This rule of priority arises from practical necessity. When two courts simultaneously assert *in rem* or *quasi in rem* jurisdiction over the same property, one court must yield to the other with regard to an *in rem* or *quasi in rem* claim if either is to "have possession or control of the property which is the subject of the suit in order to proceed with the cause and grant the relief sought." *Penn General*, 294 U.S. at 195; *see Kline*, 260 U.S. at 235. Contrary to the Liquidator's suggestion, Pet'r Br. 7-8 n.18, a suit "to establish a debt" is strictly *in personam*, *U.S. v. Bank of N.Y.*, 296 U.S. 463, 478 (1935), and is therefore unlike a suit to "marshal assets," which involves the enforcement of liens against specific property, *see, e.g., Sowell v. Federal Reserve Bank*, 268 U.S. 449, 456-457 (1925), thus requiring the court to "control the property" in order "to give effect to its jurisdiction," *Bank of N.Y.*, 296 U.S. at 477. The only assets of Mission involved in this action are its contract claims. Allstate does not dispute the Liquidator's control over those claims, but merely seeks to defend against them as an adverse party. *See Kinder*, 78 Cal. App. 3d at 580-581, 144 Cal. Rptr. at 295-296.

proof of claims is necessary for the protection of the exclusive jurisdiction of the court over the property is a mistaken one." *Id.*[40]

The Court relied on this principle in *Coit Independence Joint Venture*, in which it held that a suit against the Federal Savings and Loan Insurance Corporation in its capacity as a receiver of an insolvent savings and loan association did not "restrain or affect" the exercise of the FSLIC's receivership functions within the meaning of the applicable statute. 489 U.S. at 574-77. Examining the background against which the statute had been enacted, the Court observed that "it was well established at common law that suits establishing the existence or amount of a claim against an insolvent debtor did not interfere with or restrain the receiver's possession of the insolvent's assets or its exclusive control over the distribution of assets to satisfy claims. *Id.* at 575, citing *Morris*, 329 U.S. at 549; *Riehle*, 279 U.S. at 224; and *Bank of Bethel*, 14 Wall. at 401-402.[41]

[40] *See, e.g., Bank of N.Y.*, 296 U.S. at 478 (suit "to establish a debt" against insurer in liquidation, unlike suit to recover possession of the *res* in the control of the liquidation court, can be adjudicated "without disturbing the control of the state court"); *Riehle*, 279 U.S. at 224 ("[t]here is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*"); *see also Markham v. Allen*, 326 U.S. 490, 494-95 (1946) (*in personam* federal suits by and against probate administrator do not interfere with state court's jurisdiction over estate or violate probate exception to federal jurisdiction); *Princess Lida v. Thompson*, 305 U.S. 456, 467 (1938) ("an action in federal court to establish the validity or the amount of a claim [against trust under state court control] constitutes no interference with a state court's possession or control of a *res*"); *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 617-620 (1936) (*in personam* federal suit by receiver of insolvent bank to establish right to participate in trust does not disturb state court's *in rem* control over trust assets).

[41] Against this background, it is clear that the Liquidator reads too much into *Penn General* and *Pennsylvania v. Williams*. *See* Pet'r Br. 43-45. In *Penn General*, a federal-court equity receivership had been commenced against an insolvent insurer. The Court held that the federal court sitting in equity, "in the exercise of judicial discretion," could relinquish control over the insurer's assets to a state court that had appointed the state insurance commissioner as statutory liquidator, even though the federal court had acquired jurisdiction first. 294 U.S. at 194-99; *see also Pennsylvania v. Williams*, 294 U.S. at 182-86 (companion case; liquidation of building and loan society). But the Court stressed in *Penn General* that the jurisdiction of whichever court ended up with *in rem* control of the assets was "exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property." 294 U.S. at 198; *see Commonwealth Trust Co.*, 297 U.S. at 619-20 (doctrine of *Penn General* and *Pennsylvania v. Williams* has no application to *in personam* claims).

By complaining that federal adjudication of his action against Allstate would unduly interfere with the conduct of the liquidation proceeding, the Liquidator simply recasts in *Burford* guise an argument that this Court has rejected in *Coit*, *Morris*, and the long line of decisions they represent. If the Liquidator could not have complained about defending a claim against the Mission estate outside the liquidation court, surely he cannot complain about having to pursue his own claim against a third party there. As the Court said in *Morris* with respect to the full faith and credit statute, so too with respect to the diversity statute: neither contains an "exception in case of liquidations of insolvent insurance companies." 329 U.S. at 553. Simply put, the Liquidator's argument from "convenience in administration," *id.*, cannot defeat Allstate's right to invoke the diversity jurisdiction of the District Court.

2. The Presence of State-Law Issues Cannot Defeat Allstate's Right to Invoke Diversity Jurisdiction.

The Liquidator also contends that the presence of important state law issues justified the District Court's remand order. Pet'r Br. 5-6. The Liquidator misconceives the role of state law and policy in the *Burford* doctrine, which is concerned not with preventing federal courts from deciding important issues of state law, but with preventing them from displacing state courts when they are providing specialized review of

state administrative policymaking on matters of peculiarly local concern. *See* Part II.A, above. The Liquidator's argument simply dresses up in *Burford* rhetoric an assumption that, as this Court has repeatedly held, conflicts with the very basis of diversity jurisdiction.

A federal court has a bedrock obligation to decide issues of state law—easy or hard, settled or unsettled—arising in the cases that come before it. *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943); *see also McNeese v. Board of Educ.*, 373 U.S. 668, 673 n.5 (1963); *Propper v. Clark*, 337 U.S. 472, 489-90 (1948). Indeed, "[t]he very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991), citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Even setting aside the District Court's obligation to decide, as a threshold matter, Allstate's motion to compel arbitration under the Federal Arbitration Act, *see* Part II.C, below, this case would do no more than require the District Court to fulfill that bedrock obligation. Even if the Court were to deny the motion to compel arbitration and reach the underlying issues of liability, it would have to apply only the common law of contract; defenses based on contract language and principles such as statutes of limitations; the statutory right of setoff; or whatever other principles the parties might urge the Court to apply. Decisions on such issues constitute the everyday fare of a district court. *See Grode v. Mutual Fire*, 8 F.3d at 959.[42]

[42] While the Liquidator repeatedly refers to the supposed complexity of the insurance insolvency provisions of the California Insurance Code, he makes no attempt to explain why the District Court, if required to do so, would be incapable of reaching "the correct application and interpretation," Pet'r Br. 6, of the setoff provision, Cal. Ins. Code § 1031, or the California Supreme Court's recent construction of that provision in *Prudential Reinsurance*, 3 Cal. 4th at 1136-37, 842 P.2d at 59-60, 14 Cal. Rptr. 2d at 761. Occupying less than a single page of text, the section is patterned after the setoff provision of the federal Bankruptcy Act of 1898, codifies the common-law right of setoff, and contains no references to arcane concepts of insurance regulation. *See id.* at 1123-24, 842 P.2d at 50, 14 Cal. Rptr. 2d at 751.

The Liquidator also argues that he has a right to protection against "multiple litigation in multiple jurisdictions with varying interpretations of California law and policy." Pet'r Br. 48; *see also id.* at 9, 14, 47. He thereby echoes the District Court, which based its *Burford* holding on a determination that California's "overriding interest in regulating insurance insolvencies and liquidation in a uniform and orderly manner . . . could be undermined by inconsistent rulings from the federal and state courts" on "the hotly contested set-off issue." Pet. App. 34a. It is well settled, however, that "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River*, 424 U.S. at 816. Were the rule otherwise, any party facing repetitive litigation on identical claims would be able to seek dismissal of suits in one or several courts in favor of suits pending elsewhere involving similar issues. Notwithstanding the Liquidator's lament, the risk of inconsistent adjudications on identical issues is a risk that inheres in any multicourt system, including the multiple courts of a single state, the independent judicial systems of the several states, or the dual judicial systems of the state and federal governments.

By trumpeting the objective of California law to protect insurance policyholders, the Liquidator comes close to asserting that California has an interest in the *outcome* of this suit. Pet'r Br. 48; *see also* Pet. App. 15a. But the Liquidator cannot mean to suggest that California would have any interest in this dispute beyond ensuring its fair and just adjudication. By diligently proceeding to resolve the case by deciding the issues as they arose, the District Court would ensure the vindication of any state policies reflected in applicable California law.

C. The District Court Had No Discretion to Abstain in the Face of Allstate's Motion to Compel Arbitration Under the Federal Arbitration Act.

Immediately after removing this case to federal court, Allstate filed a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 2-4. J.A. 77-110. As this Court has repeatedly explained, that Act reflects "an emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1215-16 (1995).[43]

Sections 3 and 4 of the Act give the federal policy teeth. Those sections implement "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H.Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983). Thus, when faced with a motion to compel arbitration, the court "may consider only issues relating to the making and enforcement of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that dis-

[43] As the treaties at issue here reflect, J.A. 108-09, arbitration is the virtually universal means of dispute resolution in the reinsurance industry. Ronald A. Jacks, *Arbitration and Insurer Insolvencies, in* ABA, *Law and Practice of Insurance Company Insolvency* 260 (1986). Believing strongly in the efficiency and fairness of industry arbitration, Allstate has consistently and vigorously sought to vindicate its right under the Federal Arbitration Act to ready enforcement of agreements to arbitrate. *See, e.g., Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994) (enforcing right under reinsurance contract arbitration clause to appoint arbitrator upon adverse party's failure to do so in timely manner); *North River Ins. Co. v. Allstate Ins. Co.*, 866 F. Supp. 123 (S.D.N.Y. 1994) (holding arbitrable collateral estoppel issues pursuant to arbitration clause in reinsurance contract); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52 (W.D. Mo. 1985) (holding enforceable against liquidator of insolvent insurer arbitration clause in reinsurance contract).

trict courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). In short, courts must implement the Act in a manner that prevents a party resisting arbitration from generating the kind of "prearbitration litigation that would frustrate the very purpose of the statute." *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 843 (1995) (O'Connor, J., concurring); *see also id.* at 841-42 (opinion of the Court); *Moses H. Cone*, 460 U.S. at 23 (emphasizing "statutory policy of rapid and unobstructed enforcement of arbitration agreements").

Even if the *Burford* doctrine might otherwise apply in an action to collect money on a contract, it surely cannot apply in the face of a motion to compel arbitration under the Federal Arbitration Act. *See Moses H. Cone*, 460 U.S. at 23-26. Not only does such a motion seek no restraint on the enforcement of a state administrative order, but it is inconceivable that a decision on such a motion by a federal court would disrupt the development of uniform state policy in an area of peculiarly local concern. *See NOPSI*, 491 U.S. at 361-62.

The Liquidator nevertheless suggests that the *Burford* doctrine might apply here because the post-liquidation enforceability of agreements to arbitrate "is an unsettled question under California law." Pet'r Br. 5; *see id.* 26. The enforceability of arbitration agreements, however, is a matter of federal law. Even if California law purported to render agreements to arbitrate unenforceable against the liquidator of an insolvent insurance company,[44] it would remain a ques-

[44] Neither the California Insurance Code nor the California Arbitration Act contains any provision purporting to have that effect, and the Liquidator can point to no reported California decision holding that they do. To the contrary, the California courts have held that a liquidator "steps into the shoes of the insolvent insurer, taking the relevant claims and defenses as he finds them," *Prudential Reinsurance*, 3 Cal. 4th at 1136-37, 842 P.2d at 59, 14 Cal. Rptr. 2d at 760; *see Texas Commerce*

tion of federal law whether the antipreemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), insulated such a provision from the otherwise preemptive effect of the Federal Arbitration Act. *See Terminix*, 115 S. Ct. at 838-39; *Perry v. Thomas*, 482 U.S. 483, 489-90 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984).

As *NOPSI* makes clear, a federal court may not abstain from deciding a question of federal preemption. 491 U.S. at 362-63; *see Moses H. Cone*, 460 U.S. at 23-26. At a minimum, the District Court had no discretion to remand the case to the state court without deciding Allstate's motion to compel arbitration under the Federal Arbitration Act.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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Bank, 28 Cal. App. 4th at 1245-1246, 34 Cal. Rptr. 2d at 162; *H.D. Roosen Co. v. Pacific Radio Pub. Co.*, 123 Cal. App. 525, 534, 11 P.2d 873, 876 (1932).

APPENDIX

APPENDIX

28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.